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De Verenigde Naties en de handhaving van de vrede. De praktijk van de Verenigde Naties

Meuffels, John

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SUMMARY AND CONCLUSIONS

After Asia and Africa had been almost entirely decolonized and dozens of young states had joined the United Nations Organization, striking developments have taken place in international law within the scope of UNO. The young states that joined UN made other demands upon international law, a law in the formation of which they had not participated in any way and in which their interests and views had not been taken into account.

This thesis represents an attempt at laying down these developments in international law, at least as far as the legal rules are concerned that respect the maintenance of international peace and security. This has been done on the basis of an inquiry into the conflicts with which the UN have been confronted after 1945.

In chapter I the creation of UNO is described, starting with the Covenant of the League of Nations and ending with the conference of San Francisco, where the Charter of the UN was drawn up. Besides the fact that the motives and expectations of the founders of UNO are entered into, this chapter also deals with the principal articles which have to do with the maintenance of international peace and security. The starting point of the inquiry is the interpretation which was, in 1945, placed on various subjects, such as the refraining from the use of force in art. 2, par. 4, the right of self-defence in art. 51 and further art. 39.

The central theme of chapter II is the practice of the Security Council and the General Assembly. This chapter, in which practically all conflicts submitted to UNO are dealt with, is divided into three sections: the development of the ban on the use of force and of the grounds on which a violation of this ban may be justified, secondly the purport of the ban on non-armed intervention and thirdly the relation between the violations of human rights and in particular of the right of self-determination of peoples and the maintenance of peace. In addition, it has been investigated what the SC and the GA understand by a 'threat to the peace' within the meaning of art. 39 and what measures, legally binding or not, they have taken, on the ground of this qualification, for the solution of conflicts and the prevention and termination of acts of violence. Since, apart from the colonial wars, numerous armed conflicts are to be attributed to the will of peoples within states to achieve some form of self-determination, the last chapter deals at great length with the relations between the principle of self-determination of peoples and the maintenance of peace.

In conclusion, the annex conveys an idea of the value which resolutions may have for the progressive development of international law.

The inquiry has yielded the following conclusions:

1. The concept of peace was, in 1945, understood negatively as the absence of the threatening with and the use of armed force between states. There was consequently a close relation between art. 2, par. 4, and art. 39. Peace was threatened or violated by any state which tried to change existing international relationships by armed force or by threatening with armed force.

If the SC had arrived at the conclusion that a threat to the peace had arisen, it could take binding measures directed against the responsible state for the purpose of preventing or terminating acts of violence. The SC acted in the first place as a kind of policeman. It was, however, not allowed to use its powers granted by art. 39 for the solution of conflicts in such a way that it could settle the clashing interests under-

lying the conflict between the parties. The SC has no legislative powers. Conflicts had to be reconciled in a peaceful and in particular voluntary way by means of recommendations made by the SC. This was, in 1945, provided in chapter VI of the Charter.

2. Against the background of the horrors of the Second World War the nations that established UNO wanted an absolute ban on armed force between states to be included in the Charter. The principal justification for the violation of this ban was formed by the right of self-defence. Art. 51 mentions 'an armed attack', a term which shows that not every violation of art. 2, par. 4, can justify a reference to art. 51. To the question what is to be understood by an armed attack, however, no answer was given at San Francisco.

3. The sole object of the founders of UNO was not the maintenance of peace 'to save succeeding generations from the scourge of war'. The Charter recognizes that the concept of justice, too, must be shaped and that future changes must be taken into consideration. Various articles mention the promotion of respect for universal human rights, the principle of self-determination of peoples – on the purport of which there was indeed no agreement at all at a time when colonial conditions were still largely legalized –, the realization of a higher standard of living and full employment, and the creation of conditions for economic and social progress in the world. In short, it was realized that peace cannot be maintained without furthering justice. But the powers put at the disposal of the GA 'as a creative body' to effect justice all over the world were general and non-binding. They are in violent contrast with the concrete and partly binding powers accorded to the SC 'as an active body' for the maintenance of peace. The proposal that in art. 1, par. 1, of the Charter the maintenance of justice be recognized, besides the maintenance of peace and security, as a primary objective of the UN was not adopted at San Francisco.

4. In practice the SC and GA have seldom declared expressly that art. 2, par. 4, had been violated. Various reasons can be put forward for this. The SC and the GA are political organs in which political arguments play a preponderant part. The Cold War, for instance, prevented the SC several times from pronouncing in clear terms upon evident violations of the ban on the use of force. The SC and GA were then compelled to tone down the text of the resolutions, so that they stood a chance of being passed. And even then the permanent members often made use of their veto power.

Besides, the declaration that art. 2, par. 4, has been violated places the SC under the political and moral obligation to take the consequences of it and to implement sanctions against the guilty state. A neutral wording was then mostly preferred. The most important reason is, however, that in many cases the SC and the GA could not agree upon the question who had to be deemed responsible for the violation of the ban on the use of force and, in connection with this, what excuses within the framework of art. 51, dealing with the right of self-defence, had to be recognized.

5. Despite the fact that in practice the ban on the use of force has been applied on a limited scale and the SC has not always reacted consistently to violations of this ban, it is possible to draw certain conclusions from practice and from A/Res/2625 (XXV) as far as the purport of this ban is concerned.

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tory measures in peace time, the military occupation or the annexation of areas, the threat or use of armed violence as a violation of internationally recognized demarcation lines and indirect violence. By indirect violence is understood the organizing of irregular forces or armed troops, inclusive of mercenary soldiers, in order to invade other countries. Also the organization and/or support of and the participation in 'acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts' is a form of indirect violence if these acts boil down to the threat or use of force (compare A/Res/2625 (XXV)).

In this connection it should be observed that the SC and GA have deviated from some of these general rules if states or regimes are concerned which suppress the right of self-determination of colonial peoples with violent means or which keep foreign territory occupied (see par. 15 and 16).

6. The ban on the threat of armed force has hardly played a part in practice. In 1945 it had not been foreseen that in the nuclear age the threat with mutual and total annihilation was to form the basis of the maintenance of world peace and that in this way the threat of armed violence would be institutionalized in the 'balance of terror'. Although art. 2, par. 4, only relates to offensive threats between states, it is extremely difficult to draw a clear line between a banned threat and what is deemed necessary for the security of the state, the preparation for self-defence.

7. The GA and the SC have, in various issues (Namibia and the Middle East in the first place), not left it open to doubt that military occupation and annexation are banned. It is less clear whether a state that has military bases abroad is guilty of a violation of art. 2, par. 4, when it refuses to call back its troops after the consent for the possession of these bases has lapsed.

In practice there is no decisive answer either to the question whether a state, part of which is occupied or annexed, can refer to art. 51 for the purpose of reconquering the occupied territory after a cease-fire or truce has been arrived at. The occupation and annexation should at any rate not be regarded as 'continuing aggression' in the sense that at any moment desired a war of self-defence can be started. On the other hand, however, reasonableness would be outraged if this right was denied after all efforts at reaching a peaceful settlement had failed for many years and the occupier made ready to annex the territory. Whether such a right arises will depend on circumstances.

8. In a large number of resolutions the SC and the GA have condemned indirect violence, particularly in case states allowed their territory to be used as a base from which groups made armed attacks on other countries or in case they organized such groups and provided them with arms. Par. 10 in A/Res/2625 (XXV) presents more difficulties. The acts described there must indeed be so grave and extensive – they will mostly be performed in conjunction – that they can be put on a par with the threat or use of force within the meaning of art. 2, par. 4. It is not a simple thing to establish this, the more so as the acts concerned are partly unlawful as well on the strength of the ban on intervention and are, moreover, hard to prove.

9. Also armed retaliatory measures which do not aim at war in themselves have been condemned in numerous resolutions.

Various states defended their retaliatory actions by referring to art. 51. Their position was that the extensive and continual infiltrations from neighbouring countries, which in this way committed indirect violence, constituted an armed attack and that the retaliatory actions served in fact as self-defence to prevent new infiltrations. The SC, however, has never subscribed to this position, although it should be recognized that the difference between retaliation and self-defence is not quite clear in the event of indirect violence.

10. With regard to the right of self-defence it should be stated, in accordance with Hoffmann, that art. 51, which had been fixed as narrowly as possible in 1945 – ‘not much greater than a needle’s eye’ – has in practice grown into a ‘loophole through which armies have passed’. The purport and extent of the right of self-defence is still disputed, in particular if anticipatory self-defence is concerned – the dealing of the first blow if the opposing party makes ready to attack – and in case of defence against indirect violence.

The resolutions of the SC and the GA offer little hold. And also from the definition of aggression in A/Res/3314 (XXIX), in which the most grave acts of violence are enumerated, it cannot be gathered exactly what is to be understood by an armed attack. Besides the right of self-defence, the states have brought forward numerous other excuses for the use of armed force: humanitarian intervention, armed intervention for the protection of the nation’s own citizens and armed intervention by request. Such excuses are alleged to have been recognized by customary law and not to have been affected by the Charter. If this is indeed true, however, cannot be ascertained on the ground of the resolutions passed by the SC and the GA. In some cases they have tacitly or explicitly sanctioned them, in other cases they have disapproved of them or have kept aloof.

It needs not be explained in detail that, as a result of the hesitant attitude of the SC and the GA towards the right of self-defence, humanitarian intervention, armed intervention for the protection of the nations’ own citizens and armed intervention by request, the ban on the use of force has become a rather hollow provision.

11. In all cases in which the right of humanitarian intervention was referred to, more or less political intentions played a part. But also armed intervention which takes place with the most sincere intentions to put a stop to gross and large-scale violations of human rights is by any definition of the term an intervention which has important political consequences. This need not be the case in the event of armed intervention to protect the country’s own citizens, where temporary operations suffice. Such operations should, however, be limited to what is necessary under pressure of circumstances.

12. Civil war comes in principle under the domestic jurisdiction of the member-states. UNO cannot intervene until domestic violence threatens to give rise to an international conflict. This does not mean that the Charter as such turns against the right of revolution and rebellion. The exercise of this right, however, was impeded in customary law, because to the government in power the right was accorded to invite third parties to assist in the suppression of a domestic insurrection. It was not until the rebels had achieved the status of belligerency that third parties were not allowed to grant such a request. On the whole, however, this concept of belligerency is no longer satisfactory in an age in which the right of self-determination of peoples

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Yet it cannot be derived from UNO practice that intervention by request has no juridical basis any longer. The SC and the GA have failed to frame new rules of law with regard to domestic rebellion and the request for intervention or counterintervention. From the fact that there is not any state which has admitted that the request had been granted to help crush a domestic rebellion it can only be deduced that towards intervention by request as such great reticence is preserved. The states alleged, however, that their intervention by request had the character of counterintervention in a rebellion instigated and supported abroad and that the only object of the intervention was to neutralize foreign interference (compare the justification by the Soviet Union of its invasion of Afghanistan in December 1979). The important point is then the credibility of this argument. An actual investigation on the spot is often indispensable in order to be able to establish the nature of the rebellion. For the rest it appears from paragraphs 15 and 16 that the SC and the GA have indeed laid down rules of law with regard to the colonial war and to the conflicts arising from the violations of human rights in a racial relationship.

13. In practice hardly any connection has been established between the violation of art. 2, par. 4, and art. 39. In par. 4 it has been stated that the SC and the GA have declared in a few cases only that the ban on the use of force had been violated. Even less often did they conclude from it that a threat to or breach of the peace had arisen. They have very rarely ordered or recommended sanctions to terminate the acts of violence. The SC and the GA prefer adopting the provisional measures of art. 40, which are of a more neutral nature. The establishment that a threat to the peace has arisen is a political decision in which such factors as the extent and seriousness of the acts of violence play a subordinate part.

14. The ban on intervention comprises – since any armed intervention is banned by art. 2, par. 4, of the Charter – all forms of non-armed violence directed against the independence of a state. In resolutions 2131 (XX) and 2625 (XXV) intervention is defined as the use of economic, political and other forms of coercion which aim at the subordination of the exercise of the sovereign rights of a state and/or the securing of advantages of any kind. This ban, which is very broadly outlined in the resolutions, needs to be defined more sharply to render it practicable, because the application of economic and political coercion is a normal phenomenon in international power politics.

The practice of the SC and the GA, however, is of little avail in this respect. Although nations accuse each other regularly, few cases of political and economic coercion have till now been brought before UNO. It cannot but be concluded that the ban only relates to manifest forms of coercion that affect the existing order and are oriented to the authority structure of another nation. The so-called subversive activities, for instance, come under this ban. But whether and when the application of economic coercion is banned remains uncertain for the time being. Consequently no connection at all has been established between the ban on intervention and art. 39. The chances are that this will change in the future, when the conflicts between industrialized countries and developing countries increase and the latter will, referring to the ban on intervention, denounce certain forms of economic oppression in an attempt at reducing their one-sided economic dependence.

15. In 1945 the problems of human rights, as well as colonial relationships were regarded as issues coming under the domestic jurisdiction of the states. UNO was not allowed to intervene in a direct and imperative way.

The extent of domestic jurisdiction in art. 2, par. 7, is, however, liable to developments in politics and international law. UNO started to concern itself with the violations of human rights and colonial relationships at the moment when human rights and the right of colonial peoples to self-determination were formulated in documents on international law, numerous nations showed their anxiety over the violations of human rights and forcible denial of the right of self-determination, and international frictions arose.

The interference on the part of the SC and the GA have mainly been focussed on colonial and semi-colonial relations and on the violations of human rights in racial relationships: discrimination and oppression of a black majority by a white minority. In particular the GA, but the SC too, has established that the internal situation in the countries of Southern Africa formed a threat to the peace within the meaning of art. 39, because the violations of human rights in a gross and large-scale manner and the forcible negation of the right of self-determination have led to an internal racial war and may result in a bloody international war. It is striking that the responsibility for the existence of those threats to the peace was not put on those who fought with force for the recognition of the right of self-determination or on the black neighbour states that regularly made threats of forcible interference and applied indirect force by supporting the rebels. Peace was threatened by those states or regimes which refused to alter a status quo that was deemed intolerable and unjust by the SC and the GA. The means available to the SC for the maintenance of peace were applied to promote justice. The SC and the GA came to realize that certain forms of large-scale and intolerable injustice may lead to armed force and by this endanger the maintenance of peace. Widening the scope of art. 39, they have applied coercive measures not only to terminate the conflict between the parties but also to settle the underlying clashing of interests in favour of one of the parties. This was done although the drafters of the Charter had based themselves on the fact that conflicts can only be settled of the parties' own free will and that the primary responsibility of the SC is to maintain peace and not to maintain justice.

16. The SC and the GA have gone even further. Taking sides for the first time in an internal conflict, they have ruled out existing standards of international law and have drawn up new rules, which are partly reflected in resolution 2625 (XXV) and in the definition of aggression (A/Res/3314 (XXIX)). They have, for instance, imposed on the white governments in Southern Africa the obligation to terminate their oppression and not to use armed force against the black population. Moreover, they have denied them the right to refer to art. 51 by alleging defence of their territory against indirect violence of neighbour states, as well as the right to arm themselves and to prepare for an international armed conflict.

On the other hand, the right of self-determination of peoples and their right to fight for it, even by taking up arms, are recognized. Particularly the GA has, by this recognition, not only approved of the use of force but has even encouraged it. It has once again introduced the internal 'just war', acting itself as author. Besides, it has, partly together with the SC, imposed on third parties the obligation to refrain from any form of support to the white minority regimes. It is exactly the rebels who must, recognized as the 'authentic representatives' of the people, be supported by third parties in spite of the ban on intervention. Even the indirect violence com-

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17. It should be emphasized that the foregoing only applies to colonial peoples and to peoples oppressed by racist minorities. The SC and the GA have hardly bothered about the gross and large-scale violations of human rights in a non-racial context and about the right of self-determination of non-colonial peoples. Only in a few cases they displayed the insight that a great number of armed conflicts arise from the violation of human rights and from the disregard of the desire of peoples for self-determination.

18. Practice has shown that the GA has developed into an organ which acts as a body that is more or less on equal standing with the SC as far as the maintenance of peace is concerned and has assumed similar powers, even outside the context of the 'uniting for peace' resolution. In the issues concerning Southern Africa the GA passed resolutions simultaneously with the SC, which resolutions were often more far-reaching than those of the SC or even ran counter to them. In such cases it was always the GA which took the initiative in developing new legal standpoints which the SC confirmed some years later, reluctantly and under moral and political pressure.

The resolutions of the SC in themselves carry more weight, however, from a juridical as well as political point of view, than those of the GA. Besides the what Rölíng calls 'avant garde' role resolutions of the GA can play in the progressive development of international law, the resolutions of this organ are of special importance when they relate to conflicts in which the great powers are involved and when the SC is paralysed by their veto.